Supreme Court, U.S.
FILED

97-1407 FEB 23 1998

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NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER, 1997, TERM

THOMAS L. FALKENBERRY,
Petitioner

vs.

JOYCE K. TAYLOR,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTION PRESENTED FOR REVIEW

IN LIGHT OF *PENNZOIL V. TEXACO* AND *MITCHUM V. FOSTER*, DOES THE "ROOKER-FELDMAN DOCTRINE" PRECLUDE FEDERAL COURT SUBJECT MATTER JURISDICTION OVER A SUIT FOR A DECLARATORY JUDGMENT OF UNCONSTITUTIONALITY UNDER 28 U.S.C. SEC. 2201, AND INJUNCTIVE RELIEF UNDER 42 U.S.C SEC. 1983, TO MERELY BLOCK THE PROSPECTIVE APPLICATION OF A SELF-EFFECTING CONSTITUTIONALLY INFIRM PROCEDURAL REMEDY LACKING DUE PROCESS SAFEGUARDS CONTAINED IN A STATE COURT JUDGMENT, WHERE THE SUBSTANTIVE MERITS OF THE STATE COURT JUDGMENT ARE NOT CHALLENGED?

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CITATIONS TO THE DECISIONS BELOW

1) Thomas L. Falkenberry v. Joyce K. Taylor, United States District Court for the Northern District of Georgia, Rome Division (Docket No. 4:95-CV-0151). Summary Judgment granted December 10, 1996. Unreported.

2) **Thomas L. Falkenberry v. Joyce K. Taylor**, United States Court of Appeals for the Eleventh Circuit (Docket No. 97-8038). Opinion affirming district court issued November 25, 1997. Unreported.

STATEMENT OF JURISDICTION

The decision of the Eleventh Circuit Court of Appeals was rendered on November 25, 1997. No rehearing was sought. This Court's jurisdiction to grant certiorari is premised on **28 U.S.C. Sec. 1254**.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. Sec. 1257:

State courts; certiorari.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

* * *

42 U.S.C. Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress...

STATEMENT OF THE CASE

Petitioner Thomas L. Falkenberry and Respondent Joyce K. Taylor were married on January 6, 1988, in Gwinnett County, Georgia. On October 20, 1988, their son Zachary Lee Falkenberry was born. He is now nine (9) years old. The parties were eventually granted a decree of divorce on January 3, 1994, by the Gwinnett County Superior Court (Case No. 92A-06535-5). The final decree of divorce incorporated a child custody order entered by the Juvenile Court of Gwinnett County on September 7, 1993 (Case No. 93-0590-2). That order granted both parties "joint legal and physical custody," but made Mr. Falkenberry the primary, or day-to-day, custodian of the child. One clause contained in the order, however, eventually engendered the litigation now before the Court. Paragraph 1(n) provided:

> In the event that either the Wife [Ms. Taylor] or the Husband [Mr. Falkenberry] moves from the Metropolitan Atlanta area, i.e. Metropolitan Statistical Area as defined by the Office of Management and Budget (OMB), the primary residence of the Child [Zachary] shall be with the non-moving parent. The parent who relocated shall have the same visitation

> rights with the Child as now set forth for the Wife and the party receiving primary physical custody of the Child shall have the same rights as set forth for the Husband.

Mr. Falkenberry and Zachary reside in Cartersville, Georgia, within the Atlanta Metropolitan Statistical Area. However, Mr. Falkenberry, a testing engineer, works in Chattanooga, Tennessee, some eighty-two (82) miles, and one and a half (1 1/2) hours drive time each way, from Cartersville. Consequently, because he is devoted to his son and strongly desires to remain his custodial parent, Mr. Falkenberry works fewer hours, and earns less money, so that he can spend more time with Zachary.

Of course, it would make much more sense for them to move to Chattanooga. Ms. Taylor, who lives in Snellville, Georgia, would have just as much time with her son as she enjoys under the current plan. Furthermore, as Mr. Falkenberry has agreed to handle all of the transportation, she would not be inconvenienced. But, under the terms of the custody decree, the moment he moved into Tennessee, Mr. Falkenberry would automatically lose custody of Zachary to Ms. Taylor without any further judicial proceedings. Likewise, Zachary would lose his father's role in his daily life.

To contest this self-effecting custody transfer, on May 19, 1995, Mr. Falkenberry filed a Complaint for Declaratory Judgment and Injunctive Relief Under 42 U.S.C. Section 1983 , naming Ms. Taylor as the defendant, in the United States District Court for the Northern District of Georgia (Rome Division) (Case No. 4:95-CV-0151-HLM). He asserted federal jurisdiction under 28 U.S.C. 1331(a) and the Fourteenth Amendment to the United States Constitution. He sought a declaratory judgment under 28 U.S.C. Sec. 2201 that the particular provision of the custody order cited above violated the Fourteenth Amendment; an injunction prohibiting Ms. Taylor from enforcing the relocation provision, and attorney's fees under 42 U.S.C. Sec. 1988. The central allegations of this federal suit are that:

> The provision of the Custody Order...if enforced, deprives Plaintiff of substantive and procedural process and equal protection of the law as provided for by the Fourteenth Amendment to the United States Constitution and further deprives him of the right [of] interstate migration. Said provision, further, authorized Defendant [Ms. Taylor] to act under color of state law to change the custody of the parties' minor child without a hearing in violation of 42 U.S.C. Section 1983. (Paragraph 12).

On August 26, 1996, Joyce Taylor moved for summary judgment. She argued that 1) she was not a state actor for the purposes of a Sec. 1983 action; 2) there was no showing that Mr. Falkenberry was denied substantive due process; 3) the federal court lacked jurisdiction under the "Rooker-Feldman Doctrine" and the "Domestic Relations Abstention Doctrine"; and 4) the claims were barred by res judicata and collateral estoppel, especially "in light of the fact that Plaintiff failed to utilize state court review procedures."

On December 10, 1996, District Judge Harold L. Murphy granted the summary judgment and dismissed the suit. Mr. Falkenberry's companion summary judgment motion was denied. The court found 1) that Mr. Falkenberry had standing to pursue declaratory and injunctive relief because he adequately alleged an immediate and real threat of injury, his loss of Zachary's custody; 2) Ms. Taylor was not a Sec. 1983 state actor; and 3) the "Rooker-Feldman Doctrine" precluded federal jurisdiction [A- 2].

Mr. Falkenberry perfected a timely appeal to the Court of Appeals for the Eleventh Circuit (Case No.97-8-038). On November 25, 1997, in an unpublished one sentence *per curiam* decision the court affirmed the district court's judgment, based only upon the lack of federal court subject-matter jurisdiction under the "Rooker-Feldman Doctrine"[A-1]. The court did not address any other issue. No rehearing was sought.

ARGUMENT

The "Rooker-Feldman Doctrine" derives from the cases of **Rooker v. Fidelity Trust Company**, 263 U.S. 413 (1923) and **District of Columbia Court of Appeals v. Feldman**, 460 U.S. 462 (1983). Simply stated, the doctrine holds that federal district courts do not have jurisdiction to review the judgments of states courts, since such review is reserved to the Supreme Court by **28 U.S.C. Sec. 1257**. Despite the simplicity of its intent, the extent and ramifications of the doctrine have perplexed courts and commentators.[1] **Feldman**'s primary contribution to the concept was the rule that jurisdiction would not lie to review issues that were "inextricably intertwined" with those actually litigated in the state courts. Defining what issues are and are not "inextricably intertwined" is especially confounding to jurists and scholars alike.[2]

Nonetheless, Petitioner respectfully suggests that in light of **Pennzoil v. Texaco**, 481 U.S. 1 (1987) and **Mitchum v. Foster**, 407 U.S. 225 (1972), the suit rejected in this case

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[1] *See, e.g.* Gary Thompson, Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal Courts*, 42 **Rutgers L. Rev.** 859 (1990).

[2] ***Id.***, at 880-884.

is properly within the federal district court's subject matter jurisdiction, and beyond the scope of the "Rooker-Feldman Doctrine", since it only seeks to enjoin the prospective application of unconstitutional procedural devices contained in the state court judgment under **42 U.S.C. Secs. 1983** and **28 U.S.C. Sec. 2201**, without contesting the substantive merits of the state court decision.

I. THE AUTOMATIC CUSTODY TRANSFER PROVISION OF THE STATE COURT ORDER UNCONSTITUTIONALLY DEPRIVES PETITIONER OF HIS RIGHTS TO INTERSTATE TRAVEL AND DUE PROCESS.

The provision of the custody order which automatically deprives Mr. Falkenberry of the custody of his son, without a hearing to determine the child's best interests, solely because he moves across state lines deprives him of significant Constitutional rights. In **Jones v. Helms**, 452 U.S. 412 (1981), this Court stated that:

> It is, of course, well settled that the right of a citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution. Although the textual source of this right has been the subject of debate, its fundamental

nature has consistently been recognized by this Court. at 417-418.

The right to interstate travel for the benefit of family members was emphatically embraced by this Court in **Edwards v. California**, 314 U.S. 160 (1941). In this case, although young Zachary would have the indisputable benefits of greater financial resources to assist in his upbringing as a result of his father's increased income, while at the same time preserving the amount of quality time he would spend with his father, without diminishing his contact with his mother, the move ipso facto would destroy his security for no valid reason. Several state courts have found such blanket prohibitions against interstate relocation in child custody cases unconstitutional. *See*, **Jamarillo v. Jamarillo**, 823 P.2d 299 (N.M.1992); **In re Marriage of Fingert**, 271 Cal. Rptr. 389 (Cal.App.1990); **In re Marriage of Sheley**, 895 P.2d 850 (Wash.App.1995). Even the appellate court in Georgia, where this case arises, has recently held in another Gwinnett County case that relocation alone is insufficient to warrant a modification of a child's custody.[3] **In Interest of R.R.**, 474

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[3] In a prior decision, the Georgia Court of Appeals upheld a self-effecting custody transfer based on relocation without addressing any constitutional issues. **Carr v. Carr**, 429 S.E.2d 95 (Ga.App.1993).

S.E.2d 12 (Ga.App.1996). Extensive commentary on the problem has also arisen in the legal literature for many years now.[4] Thus, Mr. Falkenberry's right to interstate travel is unconstitutionally restricted.

Next, Mr. Falkenberry's due process right to a hearing prior to an order depriving him of his child's custody is violated by the standing provision. **Stanley v. Illinois**, 405 U.S. 645 (1972); **Mathews v. Eldridge**, 424 U.S. 391 (1976). *See, also* **M.L.B. v. S.L.J.**, _____U.S. _____, 117 S.Ct. 555 (1996); Nancy B. Shernow, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 **U.C.L.A. L. Rev**. 677 (1988).

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[4] Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, **University of Louisville J. of Family Law** 1 (1996); Edward Sivin, Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, **12 Rutgers L.J.** 341 (1981); Paula Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 **J. Family Law** 625 (1986); Blair Hoffman, Note, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 **U.C. Davis L. Rev**. 1981 (1973).

II. FEDERAL COURTS HAVE SUBJECT MATTER JURISDICTION TO ENJOIN THE PROSPECTIVE ENFORCEMENT OF UNCONSTITUTIONAL PROCEDURAL PROVISIONS OF STATE COURT JUDGMENTS, DESPITE THE "ROOKER-FELDMAN DOCTRINE."

In **Mitchum v. Foster**, 407 U.S. 225 (1972), this Court held that 28 U.S.C. Sec. 1983 unquestionably authorizes a federal court to enjoin state court proceedings in order to prevent the immediate deprivation of an individual's constitutional rights. That decision appears perfectly applicable to Mr. Falkenberry's suit below.

Next, the effect of this Court's holding in **Pennzoil v. Texaco**, 481 U.S. 1 (1987), was to remove from the "Rooker-Feldman Doctrine" federal suits filed to protect constitutional due process rights, where the merits of the underlying decision are not challenged. Even though some consideration of the merits is necessary, where the purpose of the federal action is "separable from and collateral to" the state court judgment, federal subject matter jurisdiction still exists.[5]

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[5] *See*, Gary Thompson, Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal Courts*, 42 **Rutgers L. Rev.** 859

Here, Mr. Falkenberry only asks that if the Gwinnett County court wants to take Zachary from his custody, that it first give him a hearing and allow him to present evidence as to what Zachary's best interest dictates. He in no way wants the federal court to determine who should eventually have custody of the child.

THEREFORE, THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE CITED RELEVANT DECISIONS OF THIS COURT. ACCORDINGLY, IT IS URGED THAT A WRIT OF CERTIORARI BE GRANTED, AND THEREAFTER, THE DECISION BELOW BE REVERSED AND THE MATTER REMANDED FOR FURTHER CONSIDERATION.

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(1990), at 884-891; Note, *Texaco v. Pennzoil Co.: Beyond a Crude Analysis of the Rooker-Feldman Doctrine's Preclusion of Federal Jurisdiction*, 41 **U. of Miami L. Rev.** 625 (1987).

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8038
Non-Argument Calendar

D.C. Docket No. 4:95-CV-0151-HLM

THOMAS L. FALKENBERRY,

Plaintiff-Appellant

versus

JOYCE K. TAYLOR,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

(November 25, 1997)

Before HATCHETT, Chief Judge, EDMONSON and COX, Circuit Judges.

PER CURIAM:

The District Court lacked subject-matter jurisdiction over Falkenberry's claims for the reasons stated in Part II.B.3 of its opinion and order dated December 10, 1996.

AFFIRMED.

A-2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[FILED
DECEMBER 10.1996]

THOMAS L. FALKENBERRY,
Plaintiff,

v.

CIVIL ACTION
4:95-CV-151-HLM

JOYCE K. TAYLOR,
Defendant

ORDER

This civil rights case is before the Court on Plaintiff's Motion for Summary Judgment [6], Defendant's Motion to Amend Answer [10] and Defendant's Motion for Summary Judgment [11].

* * *

[Only Section II.B.3 of the Order is reprinted here].

3. Whether the Court Has Jurisdiction to Review the Constitutionality of the Juvenile Court's Child Custody Order

"According to the Rooker-Feldman doctrine, 'a United States district court has no authority to review final judgments of a state court in judicial proceedings.' " Powell v. Powell, 80 F.3d 464, 466 (11th Cir.1996) (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). "Review of such judgments may be had only in the United States Supreme Court." Powell, 80 F.3d at 466. "The

doctrine applies not only to claims actually raised in the state court, but also to claims that were not raised in the state court but are 'inextricably intertwined' with the state court's judgment." Id. (quoting Feldman, 460 U.S. at 483 n.16); Liedel v. Juvenile Court of Madison County, 891 F.2d 1542, 1545 (11th Cir.1990) (federal district court may not decide federal issues that are 'inextricably intertwined' with state court's judgment even if plaintiff failed to raise federal issues in state court proceedings). [2]

In Liedel, the plaintiffs sought to have a federal district court enjoin a state juvenile court from enforcing orders entered in a child custody proceeding. Id. at 1545. The plaintiffs claimed the juvenile court's orders were constitutionally infirm. Id. at 1544.

The Liedel court reasoned that the plaintiffs' desired relief "would effectively nullify" the juvenile court's orders. Id. at 1545. The court concluded that, because the plaintiffs' suit effectively sought to void a final state court judgment, the federal district court lacked jurisdiction to hear the matter. Id. at 1545, 1546.

In the present case, Plaintiff claims Paragraph 1(n) of the Custody Order is unconstitutional. Plaintiff asks the Court to enjoin enforcement of Paragraph 1(n). As in Liedel, this injunctive remedy "would effectively nullify" a final state court judgment. [3] Liedel, 891 F.2d at 1545. The Court, therefore, concludes that Plaintiff's action does not fall within the jurisdiction of this Court.

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[2] The Supreme Court has stated "the fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States district court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court." Feldman, 460 U.S. at 484 n.16.

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[3] The Custody Order became a final state court order when Plaintiff failed to file an appeal of the order within 30 days of its entry. See O.C.G.A. Sec. 5-6-35 (d) (requiring appeals of divorce or child custody orders to be filed with Clerk of Georgia Supreme Court within 30 days of entry of order.)